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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD R. MUSE, *et al.*,
Individually and on behalf of Others Similarly Situated,
Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an employer/ERISA fiduciary have the affirmative duty to disclose truthful information about the serious consideration which it is giving to an enhanced severance plan?

2. Can serious consideration of an enhanced severance plan, to which the ERISA fiduciary duty to avoid material misrepresentations attaches, arise before the date on which an employer/fiduciary decides that a particular plan will be offered for a particular business purpose?

PARTIES TO THE PROCEEDING

The Petitioners are Richard R. Muse, Billie M. Marking, William C. Thorn, Thomas J. McDermott, Benjamin G. Pastrick, Thomas K. Leonard, J. Scott Hackney and Linden L. Elder, individually and as Representatives of the certified Class, being:

> All former employees of International Business Machines Corporation (IBM) who were employed by IBM at its Lexington, Kentucky site and whose employment was terminated under IBM's Voluntary Transition Payment Program, which was offered on September 28, 1989 (VTP-1), IBM's Voluntary Transition Payment Program which was offered on December 5, 1989 (VTP-2) or IBM's Voluntary Transition Payment Program/Five-Year Pre-Retirement Leave of Absence Program which was offered on January 22, 1990 (VTP/LOA), and who would have been eligible, had they not previously retired, to participate in IBM's Lexington Transition Payment Program (LTPP) which was offered on August 1, 1990.

Said Class was divided into three subclasses: (1) all members of the Class whose employment was terminated based upon their participation in VTP-1; (2) all members of the Class whose employment was terminated based upon their participation in VTP-2; and (3) all members of the Class whose employment was terminated upon their participation in VTP/LOA. The Sixth Circuit added Patsy S. Adams as a party plaintiff, and she is named as an additional Petitioner herein.

The Respondents are International Business Machines Corporation and International Business Machines Corporation as Plan Administrator of the VTP-1, VTP-2, VTP/LOA and LTPP Incentive Plans.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

Richard R. Muse, et al., individually and on behalf of others similarly situated, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit in this case [Appendix at 1a] is reported at 103 F.3d 490 (6th Cir. 1996). The opinion of the United States District Court for the Eastern District of Kentucky [Appendix at 10a] is not reported. The proposed findings of

fact and recommendations of the Magistrate Judge of said District Court [Appendix at 22a] is not reported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on December 26, 1996. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Involved herein are relevant provisions of the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"), appearing at 29 U.S.C. §§ 1104 and 1132(a). [Appendix at 37a].

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under ERISA, with specific reference to 29 U.S.C. §§ 1132(e)(1) and (f). The principle of pendant jurisdiction was asserted with respect to Petitioners' common law claims.

The gravamen of the complaint is that several hundred long-term IBM employees at IBM's Lexington, Kentucky facility were induced to resign, retire or take early leave under one of three variations of an incentive program ("VTP") at a time when IBM was seriously considering the offering and implementation of an enhanced incentive program for which these employees would have been eligible. It was alleged that these employees specifically asked whether a better plan would be made available and whether VTP was the best that would be offered. They consistently were told that no better plan would be offered and that VTP was as good as they would get. These employees retired in reliance upon these misrepresentations and in response to veiled threats by IBM of relocation or demotion if they did not participate in VTP. In addition, IBM never disclosed the serious consideration that it was giving to an enhanced plan during

the employees' VTP eligibility period(s). The subsequent enhanced plan (named LTPP) is the subject of this action.

A. Factual Background

As a means of addressing serious financial difficulties that were plaguing it in 1989, IBM retained outside consultants to assist in finding solutions. One such consultant in the summer of 1989 recommended that IBM dipose of its "non-core" Information Products ("IP") business located at Lexington at a time when more than 4400 of that site's 5400 employees were in the IP sector. High level IBM management considered this recommendation and immediately initiated steps toward implementation. As early as March 1989, IBM was considering the sale, downsizing, or closure of its Lexington facility, and had recognized the need to reduce the number of employees at the Lexington facility in either event. [Appendix at 15a]. IBM's primary goal was to reduce the number of employees at the Lexington facility [Appendix at 4a], so that the number of employees remaining would be approximately 3450.

In 1989, IBM set upon a course of action to resolve its Lexington workforce surplus through the use of severance programs. Such was necessary because of IBM's adherence to a "full employment policy," i.e., avoidance of layoffs or other involuntary employment actions aimed at downsizing. In conformity with that corporate philosophy and in furtherance of its primary goal, IBM offered the series of VTP programs (described under Parties To The Proceedings at p. ii, *supra*) collectively covering the period from September 28, 1989 through March 31, 1990. These programs offered one week of salary for each six months of service up to a maximum of fifty two weeks, commonly known as a 1X program.

All tolled, and as expected by IBM, only 364 IBM Lexington employees participated in the VTP Plans. These employees repeatedly questioned their managers

concerning the offering of a plan better than VTP and whether VTP was the best plan that would be offered. These employees knew that enhanced plans had been offered in the past [Appendix at 2a-3a]. However, they were told that "no better plan is coming" and that "[VTP] was the best deal we would get." [Sixth Circuit Joint Appendix ("JA") at 567-611]. That this was the IBM sales pitch used at Lexington was confirmed by an IBM Memo sent months later, iterating that participants had been told that "VTP was as good as it's going to get," although IBM knew that such representation was not true. [Appendix at 39a]. IBM knew that the representation was false because VTP was never designed to achieve IBM's ultimate goal of the mandated reduced headcount level at Lexington.

By November, 1989, work on all three business options was well under way. A task force was created to study the process for closing the site. In connection with this work, William Colucci, the chief Personnel executive of IBM U.S., recommended a formula for Lexington employees of two times salary for each six months of service to a maximum of 104 weeks plus $25,000 ("2X + $25K"). Bill Bowles, head of the IP Business in the U.S., already had been studying a substantial downsizing alternative for Lexington. He directed his high-level managers to study the offering of a significant severance plan. They adopted the same severance plan, namely 2X + $25K.

However, by late November, 1989, IBM had eliminated closure as an alternative, put downsizing on the back burner and shifted its focus to the sale option through the creation of the Libra task force, headed by James Forese, IBM Vice President and Group Executive. IBM's Chairman and CEO, John Akers, acknowledged that *IBM knew that in order to sell the IP Business at Lexington, it had to reduce the site's workforce beforehand.* [JA at 764]. Few potential buyers would be looking for a com-

pany over staffed by as much as 1,000 employees. [JA at 647-48].

In this same time frame, IBM directed its Controller, Michael Van Vranken, to study whether IBM should accrue the anticipated corporate restructuring expenses in calendar 1989. As a part of that accrual work, Van Vranken conducted cost studies to determine the amount of money necessary to cover an appropriate enhanced incentive plan for the targeted Lexington headcount reduction and associated restructuring expenses. He, too, used the 2X + $25K formula in his studies and calculations and concluded that in order to cover the costs of such a plan IBM should accrue approximately $300 million for Lexington. This 2X + $25K was the same severance plan used by IBM in downsizing its Boca Raton and Tucson operations a year earlier, a plan about which the Lexington employees had knowledge when they asked whether any better plan was coming.

Based upon Mr. Van Vranken's recommendations, Mr. Akers finally told IBM's Board of Directors on November 28, 1989, that IBM would take an accrual against its 1989 earnings in anticipation of restructuring, *including the sale of the Lexington site* [JA at 406], one component of which was the $300 million needed to pay for the 2X + $25K incentive plan. On December 5, 1989, after first advising his senior managers and in keeping with Board approval, Mr. Akers publicly announced that IBM would take a total accrual of $2.3 billion against 1989 earnings for such corporate wide restructuring. [JA 408-09]. Although for business reasons, Mr. Akers did not publicly disclose the $300 million set aside for Lexington headcount reduction, Mr. Van Vranken confirmed that such accrual "Assumed Lexington Downsizing" [JA at 557] and that the $300 million needed for the 2X + $25K plan "was a provision for *expected* restructuring action." [JA at 1097]. (emphasis added).

By December 1, 1989, another of IBM's consulants had furnished IBM with a list of potential buyers, including Clayton & Dubilier, the eventual purchaser. On December 8, 1989, senior IBM officers met to further discuss some of the "likely selling problems" and again acknowledged that the Lexington business employed too many people and that "solutions were only partially implemented," a reference to the small number of people who were being persuaded to sign up for VTP-1. At this same time, a sale offering memorandum was being prepared by IBM investment consultants reflecting that IBM was "selling" a Lexington workforce of 3450, or approximately 1000 less IP employees than the site currently employed.

On January 24, 1990, Mr. Forese, as head of the Libra task force, presented the progress of the sale efforts to the IBM Management Committee. He advised them that since the accounting reserve (accrual) for Lexington already had been taken, IBM "must take action this year on [the] site." He further discussed the workforce reduction necessary to achieve the targeted headcount of 3450, using a chart that IBM had prepared when closure still was an option and which reflected the potential enhanced severance plans being considered, including 2X + $25K. The record confirms that various formulas were presented, discussed, studied and massaged by senior management for many months, starting as early as March, 1989; without exception, such formulas represented severance plans superior to the VTP plans.

In late February or early March, 1990, IBM officials had their first meeting with Clayton & Dubilier. In the last week of March, another meeting was held, and on April 19, 1990, Clayton & Dubilier met with IBM officials in Lexington regarding its ongoing interest in purchasing the facility. It was IBM who assured and confirmed to this ultimate purchaser that the employee headcount would be reduced in accordance with IBM's sale offering memorandum, mirroring Mr. Akers' testimony on this point.

Conspicuously absent from the record, however, is any evidence that "it was not until IBM . . . was told by the buyer that further downsizing was necessary that IBM focused (on this particular purpose, i.e., sale)." [Appendix at 7a]. Thereafter, IBM continued to prepare for the implementation of the enhanced plan that would be offered to the remaining employees, and on June 19, 1990, a task force recommended to the Management Committee that the 2X + $25K plan be offered, to be called the Lexington Transition Payment Program ("LTPP"). On July 12, 1990, the Management Committee approved the offering of LTPP, to be effective August 1, 1990.

B. Decision Of The District Court

The Magistrate Judge's Proposed Findings of Fact and Recommendations were adopted and incorporated into the district court opinion. In tandem, then, the district court found:

- As early as March, 1989, IBM was considering the sale, downsizing or closure of the Lexington site and had recognized the need to reduce the number of employees at Lexington under any scenario [Appendix at 15a];
- On September 28, 1989, IBM offered VTP-1 to the Lexington employees, knowing in advance of that date that such program would not sufficiently reduce headcount [*Id.*];
- Consequently, IBM continued to consider the sale, downsizing or closure of Lexington and continued to consider various means by which it could further reduce the number of employees at Lexington [*Id.* at 33a];
- At least by November, 1989, one of the incentive formulas suggested by high level IBM officials for reducing headcount at Lexington was two times separation pay plus $25,000; "that is, a program which would offer benefits similar to those ulti-

mately offered by LTPP." At that time, the suggestion was rejected. [*Id.* at 15a].

- IBM admitted ". . . it was seriously considering the closure, sale, or downsizing of the Lexington facility during the eligibility periods of [the VTP plans], and . . . it was *seriously considering* various programs to reduce the number of employees at the Lexington facility during the relevant periods." Nevertheless, IBM contended that it did not consider offering the *"LTPP" program* until June 19, 1990. [*Id.* at 12a];

- Notwithstanding the facts of record and the foregoing finding of the district court concerning serious consideration of various plans during the eligibility period(s), the court found that IBM did not give serious consideration to offering "LTPP" or any other financial assistance program, during the eligibility periods of the VTP plans. "Simply because a plan *similar to LTPP* was being developed prior to April 19, 1990 does not necessarily mean that IBM was seriously considering offering the plan to its employees at the Lexington facility." [*Id.* at 18a-19a].

- LTPP was a costly undertaking and that but for Clayton & Dubilier's interest in purchasing the Lexington facility, no reasonable trier of fact could conclude that IBM would have seriously considered such a costly undertaking as a means by which to reduce headcount at Lexington. [*Id.* at 35a].

Notwithstanding the foregoing, and the failure of the district court to make any reference to the November 28, 1989 action of IBM's Board, the district court held that serious consideration of *the specific plan*, being LTPP, did not occur until April 19, 1990, when Clayton & Dubilier visited the Lexington site.

C. Decision Of The Sixth Circuit.

On appeal, although the Sixth Circuit acknowledged the existence of the multiple studies and the 1989 accrual of $300 million for an enhanced plan for Lexington [Appendix at 6a], it apparently concluded that such was not sufficient evidence of serious consideration. Although the court acknowledged the allegations (for which there was substantive evidence, as set forth above) that the Lexington employees had inquired whether a better plan was coming and were told "no," it held that IBM did not knowingly deceive plaintiffs about the possibility of an enhanced plan. [*Id.* at 8a]. Although the court found that the June 14, 1990 Clark memo [*Id.* at 39a] represented the only suggestion of improper behavior by IBM, it apparently construed that document in a "targeted plan to deceive" context. However, the undisputed deposition testimony of plaintiffs [JA at 567-611] confirmed that when asked whether any better plan would be offered, they were told that "VTP was as good as it's going to get." Their inquiries were not limited to a 2X + $25K offer and the responses were identical in phrasing to the concerns expressed by Mr. Clark in his Memo to Mr. Colucci, head of IBM Personnel.

Citing to *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988), the court observed that any misrepresentations made by IBM to plaintiffs after it gave serious consideration to the implementation of an enhanced incentive plan could constitute a breach of its ERISA fiduciary duty. [Appendix at 6a]. The court further held that *even if* plaintiffs proved serious consideration, they had the additional burden to prove breach of that fiduciary duty, measured in terms of intentional misrepresentation only ["a targeted plan to deceive the plaintiffs"]. [Appendix at 8a].

Citing to *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, 508 U.S. 940 (1993), the court observed that once serious consideration exists,

it is well-settled that the employer has a fiduciary duty not to make misrepresentations to potential plan participants about the second offering. [Appendix at 5a]. Relying on *Drennan*, plaintiffs argued that IBM should have provided them with sufficient information to enable them to make an informed decision with respect to retirement under a VTP plan, i.e., IBM had an affirmative duty to disclose progress being made with respect to an enhanced plan. [*Id.* at 3a-4a]. This argument was rejected by the court. [*Id.* at 6a-7a].

The court redefined serious consideration by creating a bright-line, date intensive test that focused upon *serious consideration of the business decision*, i.e., the sale of the Lexington facility to the ultimate purchaser. [*Id.* at 7a]. The court held that serious consideration cannot occur "until a company focuses on *a particular plan* for *a particular purpose*." *Id.* (emphasis added). As applied to the instant case, the Sixth Circuit held that IBM's ultimate goal, i.e., the reduction of excess headcount at Lexington, which only could be accomplished through an enhanced plan, was irrelevant. Yet there never was a question whether IBM would offer an enhanced plan, it was only a matter of when it would be implemented (which implementation, according to the evidence, had to occur in 1990).

Under the Sixth Circuit's new test, serious consideration arises only when the employer has a concrete, defined plan in place, to the exclusion of all other variable or alternative enhanced plans, and implementation of that concrete ("particular") plan is inextricably tied to a specific, triggering business event ("particular purpose"). [*Id.* at 7a].

The most notable of the uncontroverted evidence and judicial findings in the record were: (i) the district court's acknowledgment that IBM seriously considered various enhanced plans during the relevant period(s); (ii) that by November 28, 1989, after months of task force studies,

cost analyses, implementation of outside consultant recommendations and the prior knowledge that VTP plans would not achieve the desired results, IBM had determined that whatever business vehicle (sale, closure or downsizing) was decided upon, headcount reduction was a "given" and had to be accomplished through implementation of an incentive plan greater than VTP; (iii) through Board approval, IBM accrued funds for purposes of enhanced plan implementation, an action which was required in calendar year 1990; and (iv) on August 1, 1990, IBM announced implementation of the enhanced plan using the very 2X + $25K formula which it had been seriously considering during the eligibility period(s). Nevertheless, the Sixth Circuit, on December 26, 1996, affirmed summary judgment in favor of IBM and retrospectively applied a bright-line definition of serious consideration to the facts of the case. Petitioners have filed their Petition for Writ of Certiorari in a timely manner.

REASONS FOR GRANTING THE WRIT

I. *MUSE v. IBM* DECIDED AN IMPORTANT ERISA FEDERAL QUESTION, I.E., THAT A FIDUCIARY HAS NO AFFIRMATIVE DUTY TO DISCLOSE MATERIAL MATTERS CONCERNING THE OFFERING OF AN ENHANCED SEVERANCE PLAN TO EXISTING PLAN PARTICIPANTS UNTIL THE PLAN IS ADOPTED, AND THIS COURT SHOULD RESOLVE THAT ISSUE.

In *Howe v. Varity Corp.*, 36 F.3d 746, 754 (8th Cir. 1994), *aff'd*, 516 U.S. ——, 134 L.Ed.2d 130, 116 S.Ct. 1065 (1996), the Eighth Circuit observed that: "[I]ndeed, in some instances a fiduciary duty goes beyond merely refraining from making affirmative misrepresentations. A fiduciary can also have a duty to disclose. . . ." Although this Court's affirmance did not require consideration or resolution of this issue, it is noteworthy that the majority found that:

> Because the breach of this duty is sufficient to uphold the decision below, we need not reach the question of whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries.

Varity Corp. v. Howe, 516 U.S. ——, 134 L.Ed.2d 130, 145, 116 S. Ct. 1065, 1075 (1996). That question is now ripe for adjudication.

The *Varity Corp.* dissent addressed the subject of duty to disclose in the context of "the sponsor's future intentions with regard to terminating or reducing the level of benefits," predicated upon the dissent's opinion that no provision of ERISA requires such disclosure. *Id.*, 134 L.Ed.2d at 161, 116 S. Ct. at 1086. The dissent's concern about the consequences of an employee's inquiry into the possible effect of business decision on plan benefits, *id.*, 134 L.Ed.2d at 161 n. 9, 116 S. Ct. at 1087 n. 9, further underscores the danger that will continue to exist if this Court does not make clear the distinction between serious consideration of a business goal and serious consideration of an enhanced plan and the fiduciary duties that attach thereto, a danger explicit in *Muse v. IBM*.

In *Muse v. IBM*, the court observed that:

> The law is not well-developed, however, with respect to whether fiduciaries must disclose plan changes that have been proposed or considered but not yet adopted.

[Appendix at 5a].[1]

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[1] Compare this issue and the identical language used by the Second Circuit in *Pocchia v. NYNEX*, 81 F.3d 275, 278 (2nd Cir.), *cert. denied*, 117 S.Ct. 302 (1996). The Sixth Circuit in *Muse* additionally extracted and used, *verbatim*, a number of passages from *Pocchia* without referencing that decision (*e.g.*, compare Appendix at 6a-7a with 81 F.3d at 278), yet the factual situations and holdings are not the same. In *Pocchia*, the court held that

In total disregard of the notion of serious consideration of an enhanced plan and in an effort to respond to the issue posed, the court held:

> Until a plan is adopted, there is no plan, only the possibility of one. A fiduciary is therefore generally not required to disclose changes in a benefit plan before it is adopted. Congress' main purpose in imposing a disclosure requirement on ERISA fiduciaries was to ensure that "employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended." * * * Insisting on disclosure during the formulation of a plan and prior to its adoption would increase the likelihood of confusion on the part of beneficiaries. At the same time management would be unduly burdened by the continued uncertainty of what to disclose and when to disclose it. Moreover, any requirement of pre-adoption disclosure could impair the achievement of legitimate business goals. For example, if IBM had been forced to disclose prematurely the fact that it was studying the closing or selling of the Lexington site, which manufactured most of the IBM's typewriters, the information could have been used by competitors to damage IBM seriously.

[*Id.* at 6a-7a].

The import of this holding is that there is no duty to give truthful responses (when inquiry is made) and no affirmative duty to disclose (when inquiry is not made)

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there was no affirmative duty to disclose plan changes *in the absence of inquiry* by the employee and used the plan adoption date as its bright-line rule. 81 F.3d at 279. That was the limited issue that it was deciding. By inference, the decision suggests that such a duty exists if inquiry was made, meaning that the duty to be truthful remains. In *Muse*, the court held that not only was there no affirmative duty to disclose until the plan was adopted but, apparently, *even if inquiry is made*, there still is no duty of honesty until the bright-line point is reached, *i.e.*, the particular plan is finalized and in place.

the serious consideration being given by an employer/fiduciary to an enhanced early retirement plan until that plan has been adopted. The flaw in the court's reasoning is that whether IBM was studying closure or sale of the Lexington site is a matter of pure internal deliberations, disclosure of which would be of no benefit to an employee who is being induced to retire under that lesser plan. Under *Muse*, the consideration finally prompting such duty of honesty is not consideration of the plan itself; rather, it is the insignificant and irrelevant serious consideration of the business decision, a matter with which ERISA does not concern itself. Pursuit of a legitimate business reason may be the motivation for an employer to consider an enhanced plan, but the employee does not have "a need to know that reason." All that is important to him or her is information concerning the serious consideration being given to an enhanced plan.

The need for this Court to consider this issue also is evident from the attention that it has drawn from a number of Courts of Appeals. The Sixth Circuit, in *Drennan, supra,* held that:

> GM was impressed with a fiduciary duty to keep the Class and its members abreast of its consideration to permit their participation in VTEP so as to enable the Class members to arrive at a meaningful decision in selecting participation in an appropriate employee welfare benefit plan.

Drennan, 977 F.2d at 252. *See*, also, *Swinney v. General Motors Corp.*, 46 F.3d 512, 521 n. 4 (6th Cir. 1995) [ERISA imposes on fiduciaries a "duty to tell employees that it might someday offer another benefit [if] it is seriously considering that other benefit at the time."].

In *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750, 751 (D.C. Cir. 1990), the court held that a fiduciary "has a duty not only to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threaten interests relevant to the

relationship" and that "a beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word." In the Third Circuit, *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) instructs that "this duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful."

In *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993), the court opined that "fiduciaries must also communicate material facts affecting the interests of beneficiaries. This duty exists when a beneficiary asks fiduciaries for information, and even when he or she does not." *Contra, Pocchia v. NYNEX Corp., supra*, 81 F.3d at 279. ["While NYNEX had a fiduciary duty not to make affirmative misrepresentations or omissions, it did not have a duty to disclose proposed changes in the absence of inquiry by Pocchia. NYNEX only came under a duty to voluntarily disclose once it adopted the plan changes."] Finally, *see Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488 (10th Cir. 1995), wherein the Tenth Circuit relied upon the holdings of the Sixth Circuit (prior to its about-face in *Muse v. IBM*) as follows:

> Since *Berlin*, the Sixth Circuit has gone further and found that ERISA may impose on fiduciaries a duty to disclose material matters, though such a duty does not require the fiduciary "to disclose its internal deliberations nor interfere with the substantive aspects of the [collective] bargaining process. *Drennan*, 977 F.2d at 251.

Maez, 54 F.3d at 1501 n. 6.

The foregoing decisions suggest that guidance as to when this affirmative duty to disclose arises is needed. That guidance must come from this Court.

The Sixth Circuit holding goes beyond Richard Muse; its impact goes beyond the several hundred plan participants in the Muse Class; its has far reaching implications that will affect tens of thousands of future potential plan participants in a multitude of future enhanced plans. Those implications extend far beyond the $100,000 impact on Richard Muse and beyond the $30 million to $40 million loss to the Muse Class members, as literally billions of otherwise protected benefit dollars can be placed in jeopardy. The Sixth Circuit holding affects the decisions in the Courts of Appeals hereinabove discussed because the employer's interests have been made paramount to those of the plan participant. It is appropriate for this Court to consider the affirmative duty to disclose through grant of this Petition.

II. *MUSE v. IBM* IS IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT REGARDING ERISA FIDUCIARY DUTIES AND THE DETERMINATION OF WHEN THESE DUTIES ARISE

Two separate but distinct principles have been established by this Court in the context of fiduciary duties owed to plan participants. The first, the duty of loyalty, was expressed in *Varity Corp.* in terms of public policy:

> ERISA requires a "fiduciary" to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." ERISA § 404(a). To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense, is not to act "solely in the interest of the participants and beneficiaries." As other courts have held, "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA, ..."

134 L.Ed.2d at 145, 116 S.Ct. at 1074. (citations omitted). Similarly, Congressional intent evidencing such public policy is codified in 29 U.S.C. §§ 1001(a) and (b).

The second principle, materiality and the duty to disclose, was articulated in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), and first applied in ERISA litigation in *Kurz v. Philadelphia Elec. Co.*, 994 F.2d 136, 139 (3d Cir.), *cert. denied*, 114 S.Ct. 622 (1993) and *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir.), *cert. denied*, 114 S.Ct. 622 (1993) [*"Fischer I"*]. Rejected in *Basic, Kurz* and *Fischer I* was the application of a bright-line test which, although easier to follow, would thwart the policy reasons advanced in the [Securities Act] and [ERISA]. As stated by this Court in *Basic:*

> Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive . . . "The determination [of materiality] requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him . . . After much study, the Advisory Committee on Corporate Disclosure cautioned the SEC against administratively confining materiality to a rigid formula. Courts also would do well to heed this advice.

485 U.S. at 236.

In *Basic*, the lower court (Sixth Circuit) rejected a bright-line test that held that preliminary merger negotiations do not become material until an "agreement-in-principle" as to the price and structure of the transaction has been reached between the parties but substituted in its place a rule described as being "equally insensitive" to the policies that protect the rights of investors. In referring to the "agreement-in-principle" test, this Court observed that "[b]y definition, then, information concerning any negotiations not yet at the agreement-in-principle stage could be withheld or even misrepresented without a

violation of Rule 10(b)5." *Basic* at 233. This is the same evil presented herein. Applying *Basic* in an ERISA setting, materiality of a representation, through direct answer or through silence, depends upon the significance that a reasonable, prudent plan participant would place upon the misrepresented or withheld information. One must measure that materiality as viewed by the one for whom the information is intended, not by the one charged with the duty of providing it.

Applying the principle set forth in *Basic* and *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), the *Fischer I* court clearly held:

> Included within the overall materiality inquiry will be an inquiry into the seriousness with which a particular change to an employee pension plan is being considered at the time the misrepresentation is made. All else equal, *the more seriously a plan change is being considered, the more likely a misrepresentation*, e.g., that no change is under consideration, will pass the threshold of materiality.

Fischer I, 994 F.2d at 135. (emphasis added).

That the Sixth Circuit discarded these principles in *Muse* is self-evident. The Sixth Circuit instead has determined that the duty that otherwise mandates single minded devotion to the welfare of the beneficiaries need not concern a fiduciary until "a company focuses on a particular plan for a particular purpose." [Appendix at 7a]. Although acknowledging earlier in its opinion that the particular purpose, the primary goal, to which IBM had devoted its efforts was the reduction of the number of employees at the Lexington site [*id.* at 4a], and although IBM, at the highest level of authority, had set aside the funding for the incentive plan needed to accomplish that particular purpose, these acts do not evidence "purpose" with sufficient particularity, according to the Sixth Circuit. *Can it be said as a matter of law that this taking of a $300 million charge against profits for the*

purpose of funding an enhanced plan does not constitute serious consideration of that plan? In like fashion, the "particular plan" is defined by the Sixth Circuit with equal constriction. As a result, the court has designed a rigid formula that is as "equally insensitive" as the one it provided in *Basic* and which this Court rejected.

In sum, applying the "particular plan for a particular purpose" test and requiring that it must involve a *unique event* in the context of a duty of loyalty owed to plan participants under *Varity Corp.* is the ERISA equivalent of adopting the "agreement-in-principle" bright-line test rejected in *Basic*. Fact-specific inquiries and materiality have been replaced by a standard under which communicated information rises to a material level only when the employer deems the information to be certain in its last details from a business perspective. As described by this Court in *Basic*, the "agreement-in-principle" test is "directed solely at the comfort of corporate managers." 485 U.S. at 236. So, too, is the *Muse* test. Such a defining structure for the determination of when the communications would become material in the ERISA context guarantees that beneficiaries will be the last to receive information that would enable them to arrive at a meaningful decision in selecting participation in an appropriate employee welfare benefit plan.

By attaching the point of serious consideration to a bright line, non-ERISA based "business purpose" event, the Sixth Circuit has written the script for every employer/fiduciary hereafter to create unrelenting mischief by simply keeping some business detail unsettled, some business related variable open, until the last moment possible before announcing an enhanced plan. For certain, such condoned manipulation under the new standard assures that serious consideration never will arise until the eligibility period for participation in the lesser plan has passed. The enhanced plan would then spring into existence fully "packaged," as if it fell from the skies in that

final form. By so ruling, *Muse* is in conflict with the settled teachings of this Court.

III. *MUSE v. IBM* IS IN CONFLICT WITH RELEVANT DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AND WITH RELEVANT DECISIONS OF THE SIXTH CIRCUIT.

Since 1988, ERISA litigation has generated numerous appellate decisions regarding the concept of serious consideration and attendant fiduciary duties. *Muse v. IBM* is in conflict with (i) existing Sixth Circuit law, as embodied in *Berlin v. Michigan Bell Tel. Co., supra,* and *Drennan v. General Motors Corp., supra*; (ii) those decisions rendered by other Circuit Courts of Appeals which relied upon *Berlin* and *Drennan*; and (iii) two decisions of the Third Circuit. These conflicts are irreconcilable.

In both *Berlin* and *Drennan,* the Sixth Circuit required a fact-intensive examination of the events that ultimately led to a second offering of an incentive plan: whether an enhanced plan was ultimately adopted was irrelevant to the determination of serious consideration (employer has no duty to predict an ultimate decision to offer a plan). For example, in *Berlin,* the court looked at such events as discussions and cost-effectiveness studies concerning an enhanced plan and held that the determination of serious consideration was a question of material fact. 858 F.2d at 1164. In *Drennan,* management's continued discussions, rejections (because of expense) and renewed interest in and further exploration of class participation in a second offering was evidence of serious consideration, again a question of material fact. 977 F.2d at 251-52.

Muse v. IBM effectively eliminates any fact finding concerning events occurring prior to the decision to offer an enhanced plan. No longer are management's efforts with respect to the enhanced plan itself germane to the determination. Instead, the spotlight is now focused upon consideration of business purpose and the unique triggering

event. The fact-specific requirements of materiality of representations concerning a plan, as espoused in *Berlin, Drennan* and *Basic, Inc. v. Levinson, supra,* have been implictly overruled by *Muse v. IBM.*

The *Berlin* and *Drennan* principle that serious consideration is fact-intensive with respect to consideration of an enhanced plan has been followed in the Second Circuit in *Mullins v. Pfizer, Inc.,* 23 F.3d 663, 669 (2nd Cir. 1994); in the Third Circuit in *Fischer I, supra,* 994 F.2d at 135; *Kurz v. Philadelphia Elec. Co., supra,* 994 F.2d at 139; in the Eighth Circuit in *Wilson v. Southwestern Bell Tel. Co.,* 55 F.3d 399, 405 (8th Cir. 1995); and in the Tenth Circuit in *Maez v. Mountain States Tel. & Tel., Inc., supra,* 54 F.3d at 1500. Thus, because *Muse v. IBM* conflicts with *Berlin* and *Drennan,* it now conflicts with the foregoing decisions of at least four other Circuit Courts of Appeals.

Additionally, in *Kurz,* the Third Circuit specifically rejected imposition of a bright-line rule on substitution of a materiality standard and, citing to *Basic,* stated that "[t]ying 'serious consideration' to a single objective event in the present context would work unfairly in some instances." 994 F.2d at 139. It commented that under the bright-line test suggested by PeCo in *Fischer I,* the letter sent by its CEO announcing that an early retirement plan would be proposed to the Board of Directors could not have amounted to "serious consideration" because no proposal had as yet been submitted to the Board. *Id.* That is basic unfairness and the court so recognized it. *Muse v. IBM* conflicts with *Kurz* to the extent that it utilizes a bright-line test to tie serious consideration to a single business event unrelated to consideration of the plan itself.

Finally, *Muse v. IBM* conflicts with the newest Third Circuit decision, being *Fischer v. Philadelphia Elec. Co.,* 96 F.3d 1533 (3d Cir. 1996), *cert. denied,* —— U.S. ——, 1997 U.S. LEXIS 1665 (March 17, 1997)

[*"Fischer II"*]. Therein, the court indicated that as in any case where the misrepresentation in question is the statement that [no change in benefits is under consideration], "the only factor is the degree of seriousness with which the change was in fact being considered." *Id.* at 1538. The court, admitting that in *Fischer I* it gave little attention to the details of the term "serious consideration," attempted to provide some guidelines. In its view, serious consideration of a change in plan benefits exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change. *Id.* at 1539. Notably, the court repeatedly stressed that this was *not* a bright-line test but agreed to adhere to its holding in *Kurz* that the determination is inherently fact-specific and flexible.

In *Muse v. IBM,* the court gave no guidance whatever to serious consideration but did hold that a particular plan had to be contemplated in concrete fashion. [Appendix at 8a]. *Fischer II*, in conflict with *Muse v. IBM*, held that factor one (the "specific proposal") "does not mean that the proposal must describe the plan in its final form. A specific proposal can contain alternatives, and the plan as finally implemented may differ somewhat from the proposal." 96 F.3d at 1540. As important is the conspicuous absence in *Fischer II* of any requirement that serious consideration must be tied to a single event, i.e., attainment of the "agreement-in-principle" which is part and parcel of an identifiable business purpose for which the enhanced plan is offered. Without saying so, *Muse v. IBM* extended the bright-line test created in *Pocchia* to the point that serious consideration cannot arise until the plan has been adopted. *Fischer II* rejected *Pocchia. Id.* This conflict, as with the others discussed above, requires resolution by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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